CURRENT LEGAL PERIODICALS.

LABOR.

Crucial Issues in Labor Litigation. Jeremiah Smith. The text of this paper is a quotation from an editorial note in the Law Quarterly Review, which contained the statement, "We have said here more than once that these points will never be cleared up till we leave off talking about conspiracy and malice." Mr. Smith does not favor the use of the words "malice" and "intent" as they have been used, believing that such use has led to confusion of thought and a consequent confusion in the decisions. He finds it impossible, however, to avoid the use of them, but he first defines them explaining the interpretation which he intends shall be given them in his paper. In this instalment of the article Mr. Smith considers the liability of a single man acting independently, or not in concert with others. He considers that there have been two views taken in regard to the liability of a person for doing any act which though not in itself an actionable tort, amounts to an interference with, or molestation of, another person in his trade, business, or employment; one view being that any interference of this sort is a tort which can seldom be justified; the other that it is no ground of liability. Mr. Smith contends that the truth lies between these two extremes. "The plaintiff's right in such a case is not a specific right of the kind fully protected against all interference. It is, however, included in the broad general right that a man shall not be intentionally damaged by any one unless there is a justification." The discussion is interesting, and the "Crucial issues" are carefully presented, the presentation and discussion not, however, seeming to clear the air very perceptibly from the obscurities which have gathered about the subject. The paper is to be continued, and the next questions to be discussed are: whether the "members of a combination are liable for causing damage, if a single individual accomplishing the same result by the same methods would not be liable? What constitutes a justification? Whether bad motive operates as a rebuttal of an otherwise sufficient justification?"

Harvard Law Review, February, pp. 253–279.

INCOME TAX.

The Income Tax and the Constitution. Edward B. Whitney. After an examination into the opinions—so far as we may be said to know them—of the framers of the Constitution, at the time when they made their division of taxation into three classes, and also an examination into the decisions in the income tax cases, and the Act of 1895, Mr. Whitney says, "If a new law were taken up for consideration upon the merits, the first question considered would be the relative weight to be given to the various income tax decisions of the past. The Court would be faced with a problem which has never faced it before; namely, whether one series of decisions should be given weight because they were unanimous upon the point involved, and because one of them was substantially contemporaneous with the Constitution itself, and

was enunciated by men who were witnesses as well as judges as to the meaning of the words used in that instrument, or whether another decision should be given greater weight because it was later in point of time, and was regarded by five out of the nine judges then comprising the Court as distinguishable from the earlier ones, or as overruling them." Mr. Whitney thinks that he, as one who took part in the litigation, would be presumptious in expressing a confident opinion on the subject, and desires rather to call attention to the various phases of the case. He does, however, venture to say that the decision in 1895 was based upon a purely historical line of reasoning, "whose acceptance by the ultimate verdict of historians I think a matter of doubt." It is made plain by the further investigations of the author that he can find no historical basis for the decision of 1895, and that he believes that the framers of the Constitution never contemplated the possibility of such a construction of their phrases.

Harvard Law Review, February, pp. 280–296.

NEGLIGENCE.

The Right of Bailees to Contract Against Liability for Negligence. Hugh Evander Willis. The writer of this article undertakes to "trace the progress of the law of bailments through the past and to study its present status, for the purpose of prophesying its probable future and discovering the direction it ought to take." Naturally, with so much to do in so limited a space as a magazine article allows, Mr. Willis does not himself go into an examination of the history of the law of bailments in the past; he is satisfied to speak of the theories that Justice Holmes and Professor Beale have deduced from their own investigations, and to state such and such points are "now certain." Having dismissed history we find ourselves in the present day and in the United States, and ready to answer the question prepounded in the title. A paragraph gives sufficient space for the answer, "All liability for negligence may be excused." We next find that "the courts are uncertain," but "whatever uncertainty there may be as to the actual position of the courts, there is no uncertainty in the mind of the writer as to what ought to be their position." Mr. Willis declares, "I maintain that, on general principles, parties should be allowed freedom of contract here, and thus contract for exemption from liability for negligence, if they desire." A half page is all that Mr. Willis finds necessary to devote to demolishing all arguments upon the other side. As to the "tort aspect," nearly a page is needed to prove the writer's contention for exemption from liability, although the cases do not as yet support him, but he was to prophesy and he now prophesies that they will soon follow his opinions. When we come to consider common carriers, inn-keepers, and others of the sort, these interests are allowed to be affected with a public use, Mr. Willis admits, but with apparent regret, "it seems to me that it is against public policy to allow a common carrier to contract away its liability." But he will not allow so much in the case of simple bailments, or even, "in the case of innkeepers and other bailees affected with a public interest." Mr. Willis might read with interest the remarks of Dean Bigelow at the opening of the Boston University Law School for the year 1906–7, in regard to freedom of contract, and the results to which the prevalent doctrines upon that question have led.

Harvard Law Review, February, pp. 297–312.

Evidence.

Evidence to Show Intent. Ernest E. Williams. This is a discussion of the rules of evidence in regard to the proof of similar acts, and gives a chronological outline of the cases decided in England and Canada upon this subject. No American Cases seem to have been considered. Mr. Williams argument is intended to show that the tendency of the law, as shown in the decisions examined is toward not allowing technicalities in the law of evidence to stand in the way of proving facts which go to show the alleged intention of the act charged. Mr. Williams says, "It is a salutary rule, essential to our ideas of justice and right judicial procedure, and akin to, and almost necessarily flowing from, the fundamental principle of our law that a man is to be adjudged innocent until he be proved guilty; yet the course of justice would be seriously obstructed if no exceptions were allowed to the rule. And, after all, it is the business of our criminal courts to track down the guilty as well as to shield the innocent: the positive action of those Courts must not be lost sight of in our endeavors to preserve their negative functions from the intrusion of prejudice." Mr. Williams further says, "Opposition to this development, however, still exists. The judgments in R. v. Bond were not unanimous; lawyers commenting on it have declared emphatically that it is wrong. But are not these lawyers resting on the tradition of an old, rigorous, insular rule, rather than reasoning out the needs of justice? Even allowing that the rule in its old integrity (or in the rigidity it was at one time supposed to have) was in consonance with the judicial procedure of an earlier day, is it not well to remember, as Lord Coleridge said in *Blake* v. *Albion Life Assurance Co.*, that the law of evidence has in other respects been widened, demanding a corresponding extension of the rule excluding evidence of similar acts? And since Lord Coleridge delivered that judgment there has been a still further extension in criminal procedure by the Act permitting a prisoner access to the witness box. Former disabilities, as Mr. Justice Darling said in *R.* v. *Bond*, 'no longer exist, and, provided he have due notice, an accused person may fairly be confronted with evidence relevant to the issue now that he may give his own testimony, although it would have been hard to admit it when the witness box was forbidden to him.' Certainly, as the same learned judge contends, it is not "admissible to strive for increase in the technicality of our rules of evidence so as to narrow yet more the approaches to the source of justice."

Law Quarterly Review, January, pp. 28–41.

Legal Ethics.

Legal Ethics. Henry Wade Rogers. This is the address made to the members of the graduating class of the Albany Law School, May 31, 1906. It forms a very interesting essay on the lines so often laid down upon like occasions, on points that cannot be too often emphasized. Some of Mr. Rogers phrases which are especially noticeable are, "The ethical basis of conduct for the lawyer is the same as for any other member of society. That which one cannot honorably do as a man he cannot honorably do as a lawyer." "If one undertakes to tell you that there is one morality for the bar and another for the rest of the world, be assured he is a teacher of false doctrine. To follow after him is to go to your own undoing." "Among the duties

which the lawyer owes the state is that of saving the judiciary from becoming the spoils of party." "Never before since the government was established has agitation against existing institutions been so reckless and revolutionary and so general as now. The duty of the lawyer to the state assumes new importance in the face of the conditions which now confront this nation. Let me, therefore, commend to your attention the weighty words of a great constitutional lawyer. In his address as president of the American Bar Association in 1894 the late Chief Justice Cooley said: 'What I desire to impress at this time upon the members of the legal profession is that every one of them is or should be, from his very position and from the license which gives him special privileges in the determination of legal questions and controversies, a public leader and teacher, whose obligations to support the constitution and laws and to act with all due fidelity to the courts is not fully performed when the fundamental organization of society is assailed or threatened, or the laws defied or likely to be in the community in which he lives, as a result of revolutionary purpose, or of ignorance, or unreasoning passion, unless he comes to the front as a supporter of settled institutions and of public order, and does what he properly and lawfully can to correct any sentiment, general or local, that would in itself be a public danger, or be likely to lead to disorder or unlawful violence.' To this eminent jurist it seemed a low and very unworthy view of the lawyer's office to assume that his duty was simply to prosecute or defend in the courts for a compensation to be paid, and that he owed no duty to society to expose false theories and counteract public ignorance and inculcate respect for law and courts and government and the rights of property."

Yale Law Journal, February, pp. 225–246.

COURTS.

The Supreme Court of the United States. George P. Costigan, Jr. When a new judge for the Supreme Court is to be appointed public interest for the moment turns to that court. It is for this reason that Mr. Costigan has written this short sketch of the history, functions, and method of despatching the business of the court. The earliest years of the court were chiefly distinguished by an absence of litigation. "There was so little business that the Chief Justice varied his duties by running for governor of New York in 1792, by spending a large part of a year negotiating with Great Britain what is known as Jay's Treaty of November 19, 1794, and finally in 1795 resigned as Chief Justice to become governor of New York."

Marshall's appointment as his successor was proper in itself, but the "Mid-night appointments" in which Marshall, who, though Chief Justice, continued to act as Secretary of State until Adams' term ended, took part, were productive of much mischief, and enmities which did not end until the death of all parties concerned. This paper does not attempt to deal with the decisions of the Court, but the author declares that "the political character acquired by the court as a result of those decisions needs emphasis." The right to declare all laws null and void, state as well as national, which it regards as clearly inconsistent with the constitution, it is declared "gives rise to immense political influence."

The discredit cast upon the Supreme Court by the partisan votes of the Hayes-Tilden contest, is noted. "The result was a bad thing for the Supreme Court." Appointments have been on party lines, but "the ermine tempers the man," and the judges are not often consciously partisan, In the changeable number of Supreme Court

justices there is noted a possible danger. Whether or not "the court was packed" by Grant before the decision of the Legal Tender Cases, it is possible that this might be done by a president whose faith in himself was greater than his devotion to the Constitution. The President and Congress acting in unison could tie the hands of the Supreme Court, and even, through the addition of new justices determine its decisions. It was pointed out by Mr. Bryce that "the incident of the Legal Tender Cases disclosed a weak point in the constitution of the Supreme Court tribunal which may some day prove fatal to its usefulness."

The thoroughness of the work of the court is commended: "No case in the Supreme Court is ever referred to any one justice or to several of the justices to decide and report to the others. Every suitor, however humble, is entitled to receive, and receives, the judgment of every justice upon his case.

Yale Law Journal, February, pp. 259–272.

INTERNATIONAL LAW.

The American Journal of International Law. A Quarterly. The appearance of a new Journal of International Law in the United States is an event of much interest. The society which publishes the journal was founded in 1905, but only effected a definite organization in 1906. The first step was taken by some of the members of the Mohonk Lake Conference on International Arbitration, who issued a call to the members present at that conference. A committee was appointed to consider plans for a definite organization, and the publication of a journal exclusively devoted to international law, as the organ of the society. Friday, January 6, 1906, the constitution was adopted, and a prospectus issued. A committee was appointed to arrange for the issue of a periodical, and the American Journal of International Law, now issued in two parts is the result. The editor declares that the object of the society is, "to foster the study of international law and promote the establishment of international relations on the basis of law and justice. This is the one aim and purpose." This first issue aims to cover the year 1906, and is, therefore, very large, containing a quantity of very valuable matter. The editors do not promise so large an issue every quarter, but propose that the space devoted to leading articles shall remain approximately the same. A mere mention of the titles and authors of the leading articles in this issue will indicate the great value and interest of the publication.

International Responsibility to Corporate Bodies for Lives Lost by Outlawry. John W. Foster.

International Law: its Present and Future. John Bassett Moore.

Doctor Francis Lieber's Instructions for the Government of Armies in the Field. George B. Davis.

Calve and Drago Doctrines. Amos S. Hershey.

Insurgency and International Maritime Law. George Grafton Wilson.

Doctrine of Continuous Voyages. Charles Burke Elliott.

Notes on Sovereignty in a State. Robert Lansing.

The editorial comment is very full; there is a valuable chronicle of international events; an excellent digest of cases involving questions of international law; book reviews by the editors, and a supplemental volume of eighty-five pages, containing official documents. It is difficult to conceive of a periodical of this nature which would be an improvement upon this issue in the matter presented or in the form of presentation.